

Message Text

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ACTION EUR-25

INFO OCT-01 ISO-00 EURE-00 INRE-00 SSO-00 NSCE-00 USIE-00

CIAE-00 DODE-00 PM-07 H-03 INR-11 L-03 NSAE-00 NSC-07

PA-04 RSC-01 PRS-01 SP-03 SS-20 SAJ-01 OMB-01 IO-14

ACDA-19 DRC-01 /122 W

----- 070143

O R 271224Z AUG 74

FM AMEMBASSY BONN

TO SECSTATE WASHDC IMMEDIATE 4643

INFO USMISSION BERLIN IMMEDIATE

AMEMBASSY LONDON

AMEMBASSY PARIS

AMEMBASSY MOSCOW

USMISSION NATO BRUSSELS

C O N F I D E N T I A L SECTION 01 OF 02 BONN 13528

E.O.: 11652 GDS

TAGS: PGOV, WB, GW, GE, US, UK, FR, UR

SUBJECT: FRG GOVERNMENT-PROPOSED LEGISLATIVE SOLUTION
FOR BRUECKMANN AND SIMILAR CASES

REF: BERLIN 1451

SUMMARY: US REPS HELD, ON AUG. 26, A BILATERAL FOLLOW-UP TO JULY 20 BONN GROUP MEETING AT WHICH FRG JUSTICE MINISTRY REP HAD ANSWERED CERTAIN QUESTIONS ON SUBJECT LEGISLATION. IN OUR BILATERAL, THE BACKGROUND AND OPERATION OF LEGISLATIVE SOLUTION FOR BRUECKMANN AND FUTURE SUCH CASES WERE MORE FULLY DISCUSSED. AS CONSEQUENCE, EMBASSY BELIEVES FRG-PROPOSED LEGISLATION MAY PROVE LESS LIKELY TO INVOLVE ACTUAL DIFFICULTIES THAN US, UK AND FRENCH REPS HAVE HITHERTO THOUGHT. SUBJECT MATTER WILL BE CONSIDERED FURTHER AT BONN GROUP MEETING ON AUGUST 28. END SUMMARY.

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1. AT INFORMAL EMBOFF MEETING WITH FRG REPS

(VON RICHTHOFEN, FOREIGN OFFICE LEGAL, AND RENGEL, JUSTICE MINISTRY), LATTER CONFIRMED THAT FEDERAL GOVERNMENT DRAFT AMENDMENT TO 1953 LAW ON INNER-GERMAN LEGAL ASSISTANCE ON CRIMINAL MATTERS (SUMMARIZED REFTEL) WOULD MAKE NEW AND EQUAL PROVISION IN BOTH FRG AND IN WSB UPON TAKEOVER, FOR APPEALS FROM HIGHER LAND COURTS TO BUNDESGERICHTSHOF (BGH). RENGEL ALSO CONFIRMED THAT CONTEMPLATED LEGISLATION WAS PURPOSELY DRAFTED SO AS NOT TO FURNISH BASIS FOR BRUECKMANN APPEAL TO BGH ON SUBSTANCE OF KAMMERGERICHT DECISION CONFIRMING THAT SHE IS SUBJECT TO RENDITION TO GDR (PARA 3(A) REFTEL). BRUECKMANN MAY, HOWEVER, HAVE BASIS FOR APPEAL TO BGH IF A FURTHER REQUEST FOR RELEASE FROM CUSTODY WERE DENIED BY GENERALSTAATSANWALT AND/OR KAMMERGERICHT, IN WHICH CASE THERE WOULD BE NO BASIS FOR BGH TO REFER TO OR DRAW ON ADVISORY OPINION OF BUNDESVERFASSUNGSGERICHT (BVG) IN BRUECKMANN CASE WHICH DEALT WITH SUBSTANTIVE CONDITIONS FOR RENDITION.

2. RENGEL INDICATED THAT BRUECKMANN HAD PROVED A VERY TROUBLESOME CASE, FACING FEDERAL GOVERNMENT WITH NEED TO FIND SOLUTION LEGALLY PERMITTING RENDITION TO BE DENIED THROUGH LEGISLATION THAT WOULD MEET FOLLOWING REQUIREMENTS: (1) HAVE GENERAL APPLICATION AND ACTUAL EFFECT IN BOTH FRG AND WSB UPON TAKEOVER TO AVOID BEING A "LEX BRUECKMANN" THAT COULD PROVOKE GDR REPRISALS THROUGH CURTAILMENT OF COOPERATION IN FRG-GDR LEGAL ASSISTANCE IN PENAL MATTERS, A COOPERATION THAT WAS REAL IN BOTH DIRECTIONS AND THAT FRG WISHED TO MAINTAIN; (2) PROVIDE FOR UNIFORMITY IN LAENDER IMPLEMENTATION OF 1953 LAW BY MAKING LAENDER COURT DECISIONS APPEALABLE TO BGH; (3) AVOID OVERRIDING BY LEGISLATION CURRENT COURT FINDING THAT BRUECKMANN IS RETURNABLE, AS LEGISLATION SO DOING WOULD HAVE EFFECT OF PRECLUDING WSB AND FRG AUTHORITIES FROM TRYING BRUECKMANN FOR MURDER OR MANSLAUGHTER, LEADING TO HER UNDESIRABLE IMMUNITY FROM TRIAL FOR ADMITTED CRIME; AND (4) HAVE PROVISIONS ACCEPTABLE TO ALLIES PERMITTING AMENDMENT'S TAKEOVER IN WSB. FEDERAL GOVERNMENT BILL WAS DESIGNED TO MEET THESE REQUIREMENTS, AND

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WOULD CONFER ON BERLIN GENERALSTAATSANWALT POWER TO REOPEN CASE AT OWN OR BRUECKMANN'S INITIATIVE, BASED ON NEW FACTS. RENGEL STATED THAT IN VIEW OF UK COMMANDANT'S CERTIFICATE, BVG ADVISORY OPINION IN BRUECKMANN CASE WOULD "CERTAINLY NOT" BE CONSIDERED SUCH A NEW FACT. THE PENDING APPEAL BEFORE STRASBOURG HUMAN RIGHTS COMMISSION (HRC) WOULD IN ITSELF ALSO NOT LIKELY BE CONSIDERED THE NECESSARY NEW FACT (FINDING

IT TO BE SO WOULD FLY IN FACE OF PART OF JUNE 6
DECISION OF KAMMERGERICHT); RATHER, THE NEW FACT
THAT WOULD PERMIT REOPENING OF RENDITION DECISION
UNDER THE AMENDMENT TO THE 1953 LAW WOULD BE THAT AS
BRUECKMANN CANNOT BE RETURNED TO GDR PENDING OUTCOME
OF HRC PROCEEDINGS THAT MAY TAKE ANOTHER YEAR, HER
CONTINUED CUSTODY FOR POSSIBLE RENDITION WOULD BY FAR
EXCEED PERMISSIBLE 6-MONTH MAXIMUM FOR INVESTIGATIVE

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CUSTODY UNDER FRG LAW PREPARATORY TO TRIAL FOR CRIME
ITSELF. GENERALSTAATSANWALT PROBABLY WOULD USE THIS
FACT TO REOPEN AND REVERSE PREVIOUS RENDITION FINDING
IN ORDER TO PERMIT BRUECKMANN'S SPEEDY TRIAL IN WSB FOR
MURDER OR MANSLAUGHTER WITHOUT AT LEAST A FULL SECOND
YEAR OF INVESTIGATIVE CUSTODY. (RENGER EXPLAINED THAT
IF BRUECKMANN WERE RELEASED FROM CUSTODY PENDING HRC

DECISION AND MADE HER WAY TO FRG, AS THERE IS A VALID AND FINAL COURT DETERMINATION THAT SHE CAN BE RETURNED TO GDR SHE COULD NOT BE TRIED IN FRG, BUT WOULD BE RETURNED TO BERLIN FOR FURTHER CUSTODY PENDING POSSIBLE RETURN TO GDR. IF BRUECKMANN WERE FOUND OUTSIDE FRG, EXTRADITION COULD NOT EVEN BE SOUGHT BY FRG AS NO CRIMINAL CHARGES AGAINST HER HAVE BEEN OR CAN BE BROUGHT WHILE ORDER FOR HER RENDITION REMAINS IN FORCE.)

4. INFORMED OF TRIPARTITE CONCERN, BEYOND BRUECKMANN
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CASE ITSELF, THAT POSSIBILITY OF APPEAL IN BERLIN LEGAL ASSISTANCE CASES TO BGH WOULD PERMIT APPLICATION BY BGH OF BVG BRUECKMANN ADVISORY OPINION, RENGIER EXPRESSED BELIEF THAT NO FUTURE BERLIN CASE WOULD AGAIN RESULT IN FINDING OF RETURNABILITY AT LEVEL AS HIGH AS BERLIN KAMMERGERICHT. IN RESPONSE TO CONCERN THAT THERE COULD BE AN INSTITUTIONAL PROBLEM, DISTINGUISHABLE FROM OTHER APPEALS TO BGH FROM DECISIONS OF BERLIN COURTS IN CIVIL AND CRIMINAL MATTERS BY REASON OF FACT THAT BVG ADVISORY OPINION IN BRUECKMANN CASE WAS A DECISION BASED ON CASE ARISING IN BERLIN THAT WOULD BECOME GOVERNING FOR BERLIN CASES VIA THE BGH, RENGIER INDICATED THAT BGH TASK WOULD BE TO APPLY IN SUCH CASES THE LAW APPLICABLE IN WSB, AND THAT THIS LAW MIGHT WELL BE SEEN BY BGH TO INCLUDE THE SPECIAL LEGAL SITUATION IN WSB MOST RECENTLY REFLECTED IN UK COMMANDANT'S CERTIFICATE. AS COURTS INCLUDING THE BGH WERE INDEPENDENT OF PREFERENCES OF FRG FEDERAL GOVERNMENT, RENGIER THOUGHT BUT COULD NOT BE CERTAIN THAT BGH WOULD AVOID EXPRESSLY APPLYING THE BVG BRUECKMANN OPINION CRITERIA WITH RESPECT TO A CASE ARISING IN BERLIN; IT MIGHT APPLY THEM AS NECESSARY WITHOUT MENTIONING THE BVG BRUECKMANN OPINION. EMBOFF INDICATED THAT IF THIS WERE THE CASE, FURTHER GUIDANCE AND CLARITY MIGHT BE FURNISHED FOR ALL CONCERNED IF THE ALLIES, IN POSSIBLY PERMITTING TAKEOVER OF GOVERNMENT-PROPOSED AMENDMENT TO 1953 LAW, DID SO WITH RESERVATION THAT IN REVIEWING CASES ARISING IN BERLIN, THE BGH SHALL NOT HAVE RECOURSE TO ANY BVG DECISION, PAST OR FUTURE, ISSUED WITH RESPECT TO ANY CASE ARISING IN BERLIN, THEREBY REASSERTING ALLIES' POSITION THAT THEY CANNOT PERMIT BVG TO ACCOMPLISH INDIRECTLY IN WSB WHAT THAT COURT CANNOT DO DIRECTLY. NEITHER RENGIER NOR VON RICHTHOFEN THOUGHT THAT SUCH A RESERVATION WOULD BE LIKELY TO CAUSE DIFFICULTIES IN PRINCIPLE, ALTHOUGH THEY SAID THE RESERVATION WOULD NEED TO BE CAREFULLY WORDED TO AVOID UNDUE OR UNNECESSARY INTERFERENCE TO DESIRED

AND PERMISSIBLE LEGAL UNITY BETWEEN FRG AND WSB.

5. ABOVE IS BELIEVED TO REPRESENT LIKELY COURSE OF AT
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LEAST PART OF DISCUSSION AT BONN GROUP MEETING
SCHEDULED FOR AUG. 28, AT WHICH FRG REPS ARE LIKELY
AGAIN TO PRESS FOR EARLY ALLIED APPROVAL OF FEDERAL
GOVERNMENT PROPOSED AMENDMENT OF 1953 LAW. RENGEL
INDICATED THAT MINISTRIES ARE OPERATING UNDER
CHANCELLERY ORDERS TO HAVE NEW LAW SUBMITTED, ENACTED
AND PUBLISHED IN BUNDESGESETZBLATT BY NO LATER THAN
OCT. 18.
CASH

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Message Attributes

Automatic Decaptioning: X
Capture Date: 01 JAN 1994
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: EXTRADITION, LAW, TRIALS, BERLIN TRIPARTITE MATTERS, COURTS
Control Number: n/a
Copy: SINGLE
Draft Date: 27 AUG 1974
Decaption Date: 01 JAN 1960
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Authority: golinofr
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 28 MAY 2004
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1974BONN13528
Document Source: CORE
Document Unique ID: 00
Drafter: n/a
Enclosure: n/a
Executive Order: GS
Errors: N/A
Film Number: D740236-0831
From: BONN
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1974/newtext/t19740816/aaaaanex.tel
Line Count: 241
Locator: TEXT ON-LINE, ON MICROFILM
Office: ACTION EUR
Original Classification: CONFIDENTIAL
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 5
Previous Channel Indicators:
Previous Classification: CONFIDENTIAL
Previous Handling Restrictions: n/a
Reference: BERLIN 1451
Review Action: RELEASED, APPROVED
Review Authority: golinofr
Review Comment: n/a
Review Content Flags:
Review Date: 05 APR 2002
Review Event:
Review Exemptions: n/a
Review History: RELEASED <05 APR 2002 by shawdg>; APPROVED <26 JUN 2002 by golinofr>
Review Markings:

Declassified/Released
US Department of State
EO Systematic Review
30 JUN 2005

Review Media Identifier:
Review Referrals: n/a
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
Secure: OPEN
Status: NATIVE
Subject: FRG GOVERNMENT-PROPOSED LEGISLATIVE SOLUTION FOR BRUECKMANN AND SIMILAR CASES
TAGS: PGOV, WB, GE, GC, US, UK, FR, UR, (BRUECKMANN, INGRID)
To: STATE
Type: TE
Markings: Declassified/Released US Department of State EO Systematic Review 30 JUN 2005